UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE E. WILSON, Warden, California State Prison, San Quentin, California, Appellant, vs. WILLIAM J. BOWIE, Appellee.	)	No. 22569

APPELLANT'S OPENING BRIEF

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JURISDICTION

The jurisdiction of the United States District Court to issue the writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

This is an appeal by Lawrence E. Wilson, former Warden and Louis S. Nelson, Warden of the California State Prison at San Quentin, California, respondent below and custodian of appellee, William J. Bowie, from an order of the United States District Court for the Northern District of California.

A. Proceedings in the State Courts.

Appellee, William J. Bowie, was convicted after trial in the Superior Court of the State of California for the City and County of San Francisco of assault with a deadly weapon. On February 10, 1961, he was sentenced to the state prison for the term prescribed by law.

Appellee appealed the judgment and the District Court of Appeal of the State of California affirmed the conviction on February 15, 1962. People v. Bowie, 200 Cal.App.2d 291. Appellee's petition for a hearing by the Supreme Court of the State of California was denied on April 11, 1962. On November 5, 1962, the United States Supreme Court denied Bowie's petition for a writ of certiorari. 371 U.S. 893.

An application for a writ of habeas corpus was denied by the California Supreme Court on February 20, 1963. On June 10, 1963, a petition for writ of certiorari was dismissed by the United States Supreme Court. 374 U.S. 818.

An application for a writ of habeas corpus was filed in the California Supreme Court on March 17, 1967 and was denied on June 21, 1967.

B. Proceedings in the Federal Courts.

In November of 1962, Bowie filed a "Petition for a Writ of Habeas Corpus Ad Testificandum" in the United States District Court for the Northern District of California, Southern Division, Case No. 41113.

On December 26, 1962, United States District Judge Stanley A. Weigel denied Bowie's petition for a writ of habeas

corpus.

On May 10, 1963, Bowie filed another "Writ of Habeas Corpus Ad Testificandum" in the United States District Court for the Northern District of California, Southern Division, Case No. 41584.

On July 6, 1963, United States District Judge W. T. Sweigert denied Bowie's petition.

Then, on September 25, 1963, Bowie filed an "Application for a Writ of Habeas Corpus with Allowance for Certificate of Probable Cause" in the United States Court of Appeals for the Ninth Circuit.

On January 16, 1964, Judge Stephens denied Bowie's petition for a writ of habeas corpus.

On January 14, 1965, the order of the United States District Court was affirmed by this Honorable Court (United States Court of Appeals No. 19396).

On May 17, 1965, three years after his conviction, appellee filed an application for a writ of habeas corpus in the United States District Court, Northern District of California, Southern Division. On that same date, an order to show cause was issued. Appellant, respondent below, filed a return to the order to show cause on June 11, 1965. Thereafter, additional points and authorities were filed by the respective parties and a hearing was held on July 7, 1965. Throughout the District Court proceedings appellee was represented by privately retained counsel.

On January 18, 1966, the District Court denied the

petition for writ of habeas corpus, discharged the order to show cause and dismissed the proceedings. The District Court concluded that appellee's claim that he made certain incriminating statements prior to being advised of his constitutional rights was foreclosed since the United States Supreme Court's ruling in Escobedo v. Illinois, 378 U.S. 478 (1964) could not be retrospectively applied. The court also determined that the appellee was advised of his right to counsel during the proceedings against him in the courts of the State of California and that appellee effectively waived the right to assistance of counsel. Finally, the court concluded that the absence of the complaining witness from the trial in Superior Court did not constitute a denial of due process.

On February 14, 1966, a notice of appeal was filed. On February 23, 1966, a certificate of probable cause was issued by the Honorable Alfonso J. Zirpoli, Judge of the United States District Court, Northern District of California, Southern Division.

On February 15, 1967, this Court vacated the order of the United States District Court denying the writ of habeas corpus in order to allow the appellee to exhaust his state remedies on three questions: "1. Whether he was deprived of his right of confrontation of witnesses as guaranteed by the Sixth Amendment. 2. Whether his incriminating statements were involuntary. 3. Whether he should have been warned as to his right not to testify as guaranteed by the United States Constitution."

On November 16, 1967, the District Court ordered that the writ of habeas corpus be issued. Execution of the order releasing appellee from custody was stayed pending filing of a notice of appeal. The appellant's petition for a certificate of probable cause to appeal was granted on December 5, 1967 at which time a notice of appeal was filed. On that same date the District Court granted appellant's motion for stay of execution of its order pending determination on appeal.

Appellee's application for release on his own recognizance was denied on March 8, 1968 by this Court.

The District Court in granting the writ held that the transcript of the preliminary hearing was improperly admitted into evidence in violation of the appellee's Sixth Amendment right to confront and cross-examine witnesses. The court further held that a trial judge must inform a defendant, representing himself in propria persona, of his right not to take the stand.

STATEMENT OF THE FACTS

A. Facts established at the trial in superior court.

Officer Dennis Finnegan of the San Francisco Police Department testified that he responded to a call at 481 Minna Street on December 3, 1960, at approximately 9:00 o'clock in the evening (RT* 32). On entering the lobby of the hotel located at that address, appellee was discovered slashing and stalking Peter Coletsos with a knife (RT 32, 33). Coletsos

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* As hereinafter used, "RT" refers to the Reporter's Transcript of the proceedings held in the Superior Court for the City and County of San Francisco.

was bleeding from the left side just under his ribs (RT 33). There was blood on the knife and blood on appellee's hands (RT 33). The police officer ordered appellee to drop the knife and turn around. The officer repeated his order and the appellee then turned around with the knife still in his hand and pointed it at the police officers (RT 34, 40). The officers jumped the appellee, knocked him to the ground and took the knife from him.

The police officers asked appellee why he had stabbed Mr. Coletsos and he replied that he had stabbed him because he had interfered. Appellee also said he would kill him (Coletsos) if he had a chance and that he would have killed him if the police had not arrived (RT 36). Mr. Coletsos was taken in an ambulance to the emergency hospital to receive medical treatment (RT 36).

A second officer arrived on the scene at the point of time when appellee was being subdued and he observed wet blood on the appellee, on the floor and on the victim (RT 42). The appellee voluntarily admitted to this officer that he wished he had killed the man whom he had stabbed and that he would have liked to have gotten one of the policemen also (RT 43).

The People attempted to subpoena Mr. Coletsos but were unable to do so (RT 44).

The appellee testified in his own behalf and stated that he had drunk approximately three fifths of wine, that he had taken aspirin and other medication for a severe headache which made him unable to recall all the events that had transpired (RT 45, 46, 50). Appellee did recall that he had

fought with a man who attempted to enter his apartment but declared that it was in defense of himself, his wife and his home (RT 45, 46, 50). Appellee stated that the figure with whom he struggled had attacked him with a hammer and also struck him with such an instrument. Appellee admitted that the man with whom he had fought went downstairs and that he himself ran down the stairs for help and that everything else was a blank (RT 50).

B. The preliminary hearing proceedings.

Peter Coletsos testified at the preliminary examination that he was living at 481 Minna Street in the city and county of San Francisco, on December 3, 1960. As he was walking out in the hallway at approximately 9:00 p.m., he started to pick up some newspapers in the hall when he was approached by the appellee who abused him and tried to kick him (PHT* 8). Coletsos had never seen appellee before (PHT 8). Coletsos then walked downstairs. Appellee followed him downstairs with a knife and cut him in the neck and stomach with the knife. Coletsos was bleeding from these wounds when the officers arrived and subdued appellee. As a result of these wounds, Coletsos spent nine days in the hospital (PHT 8-9).

Irene Bowie, appellee's wife, testified at the preliminary examination to the effect that she had stabbed herself (PHT 19-20).

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* As hereinafter used, "PHT" refers to the transcript of the preliminary hearing held in the San Francisco County Municipal Court.

APPELLANT'S CONTENTIONS

I. The District Court erred in holding that petitioner had been denied the right of confrontation and cross-examination of witnesses.

II. The District Court erred in holding that the state trial court was compelled to advise petitioner of his constitutional right not to take the stand.

ARGUMENT

I

THE DISTRICT COURT ERRED IN HOLDING THAT PETITIONER HAD BEEN DENIED THE RIGHT OF CONFRONTATION AND CROSS-EXAMINATION OF WITNESSES.

The District Court in its opinion stated that "the sole question for decision, then, is whether the prior recorded testimony was properly admitted." The court thereafter held that it was improperly admitted. The District Court thus completely omitted a second and crucial question, i.e., whether the state trial court read and considered the prior recorded testimony. It is appellant's position that the record clearly demonstrates that the trial court never read or considered the transcript of the preliminary hearing and that the evidence introduced in the Superior Court, disregarding the preliminary examination transcript, is sufficient to support petitioner's conviction.

In order to determine whether the trial judge read and considered the preliminary hearing transcript the state court record must be carefully examined.

An analysis of the Reporter's Transcript discloses that on January 11, 1961, appellee appeared for arraignment. At this time he pleaded not guilty to each of the charges against him and demanded a jury trial (ART* 1-2). February 9, 1961 was set as the trial date (ART 3). On January 13, 1961, at his request, appellee's case was advanced and called for trial. Appellee was asked if he wished to submit the matter on the transcript. At this point, the public defender who was not representing appellee interposed that appellee did not understand and suggested that the matter be set for January 20, 1961 (RT 1-2). Appellee requested the transcript of the preliminary examination which had apparently been delivered to someone attached to the Public Defender's office (RT 2-4). Appellee insisted on an early trial date.

On January 20, 1961, appellee's case was called for trial in the Superior Court for the City and County of San Francisco. At the time the clerk called the matter, he made the following statement:

"THE CLERK: The matter of William Bowie, for decision. He had waived a jury trial and submitted it on the transcript.

THE DEFENDANT: Yes.

THE CLERK: We haven't received that transcript.

THE COURT: He didn't receive it?

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* As hereinafter used, "ART" refers to the Augmented Reporter's Transcript of the proceedings held in the Superior Court for the City and County of San Francisco.

THE CLERK: Fitzgerald Ames --

THE COURT: He never received it?

THE DEFENDANT: I don't know -- they were over there when I gave it to --

THE CLERK: He's got it.

THE COURT: Oh, he has it? You want a hearing now, is that right?

THE DEFENDANT: Yes.

(The transcript of the preliminary hearing was received, reading as follows:)" (RT 5:4-19).

* * *

THE COURT: All right. Call the witnesses. You sit right at the counsel table.

MR. FLOYD: In any case, the matter was submitted on the transcript.

THE COURT: Did you submit the case on the transcript? Did you intend that I read this transcript and make a decision from that, or did you want to testify?

THE DEFENDANT: Your Honor, I want the witnesses present, with the Court's approval, to question them, to have the privilege of cross-examining them, and let the Court decide the matter after that.

THE COURT: Very well.

MR. FLOYD: At this time, your Honor, may I call Officer Finnegan to the stand, please." (RT 31:1-14). Thereafter, Officer Finnegan took the stand and testified that he saw Bowie with a knife in his hand slashing at one

Peter Coletsos. Coletsos had no weapon and was bleeding from a wound on his left side. Bowie admitted to the officer that he stabbed Coletsos and would have killed him had the police not arrived. Petitioner thereafter cross-examined Officer Finnegan. Officer Mulligan was then called by the prosecution, testified in corroboration of Officer Finnegan's testimony, and was then cross-examined by Bowie. The People rested after the prosecutor informed the court that they had subpoenaed Coletsos but that he was not in court. The petitioner then took the stand and testified in his behalf. The trial judge thereafter found the petitioner guilty of the lesser included offense of assault with a deadly weapon (Count One) and dismissed the other count of assault with intent to commit murder (Count Two).

The above detailed review of the state trial court record demonstrates that the trial court did not consider the transcript of the preliminary hearing in arriving at its finding that the appellee was guilty of assault with a deadly weapon. Thus, the record shows that after the appellee replied in the affirmative that he had waived a jury trial and submitted the case on the transcript, the clerk stated, "We have not received the transcript." In other words, the court did not at that time have a copy of the preliminary hearing transcript.

The court then asked if the appellee wanted a hearing now, and the appellee replied in the affirmative. At this point, the court reporter stated the preliminary hearing transcript was received. The trial judge then requested the prosecutor to

call the witnesses. When the prosecutor stated the matter was submitted on the transcript, the trial judge asked the appellee if he was submitting the case on the transcript. The appellee then stated that he wanted the witnesses present to question them and let the court decide the matter after that. The court then stated, "Very well," and the prosecutor then called the witnesses. The appellee thereafter testified and immediately thereafter the trial judge found the defendant guilty of assault with a deadly weapon. Inasmuch as the trial judge granted appellee's request that the witnesses testify in Superior Court and the fact that the trial judge found appellee guilty immediately after the testimony had concluded, with no recess or break in the proceedings for purposes of reading the transcript submitted, it is clear that he rested his decision solely upon the evidence produced before him at the trial in Superior Court. Here the trial court record affirmatively shows that the trial judge had not received the preliminary hearing transcript prior to the Superior Court proceeding, that he then immediately heard the testimony of the officers and the petitioner and thereafter immediately found the defendant guilty. The record amply demonstrates that the trial judge totally disregarded the transcript of the preliminary hearing in making his finding that appellee was guilty of assault with a deadly weapon.

The only remaining question therefore is whether the evidence produced before the Superior Court, standing alone, without reference to the proceedings of the preliminary examination is adequate to support the conviction. It is

appellant's contention that the evidence is more than sufficient to support petitioner's conviction for the offense of assault with a deadly weapon in violation of California Penal Code section 245.

In any event, there would be no basis for this Court to hold the evidence insufficient. There is a difference between a conviction based on evidence deemed insufficient as a matter of state criminal law and one so totally devoid of evidentiary support to raise a due process issue. It is only in the latter situation that there has been a violation of the Fourteenth Amendment affording the state prisoner a remedy in a federal court on a writ of habeas corpus. Thompson v. City of Louisville, 362 U.S. 199, 206 (1960); Buchanan v. McGee, 290 F.2d 711 (9th Cir.), cert.denied 368 U.S. 990 (1961).

Certainly in this case there was substantial evidence against the petitioner. A San Francisco police officer was called to the Minna Street address where appellee resided, at approximately 9:00 p.m. on December 3, 1960. He entered the lobby of the hotel and found appellee with a knife in his hand, slashing and stalking one Peter Coletsos (RT 32). Coletsos had no weapon (RT 33). There was blood on the knife and on Coletsos and Coletsos was bleeding from his left side just under his ribs. Coletsos had to be taken to the hospital for medical treatment. Appellee made a voluntary confession to two police officers to the effect that he stabbed Coletsos, and would have killed him had the police not arrived. He said that the victim had been knocking at his door and had bothered him and that he was going

to kill him (RT 36-41). The bone-handled knife used by appellee was received into evidence (People's Exhibit I, RT 33, 44).

In appellee's own testimony, he corroborated the evidence against him, at least to the extent of the happening of a fracas and, more specifically, that he had struggled with this individual and that both had gone downstairs (RT 50).

The foregoing evidence is amply sufficient to support appellee's conviction of the crime of assault with a deadly weapon. The gist of such an offense is an assault with a weapon likely to produce death or great bodily harm. People v. Lushenko, 170 Cal.App.2d 772 (1959). In a conviction for violation of section 245 of the Penal Code, it is the character of the weapon and the method of its use which form the essential elements of the offense. People v. Peak, 66 Cal.App.2d 894 (1944).

A knife, although not an inherently dangerous weapon, becomes an instrument of that character when it is used in a manner, such as stabbing, so as to cause severe bodily injury. People v. Arguilida, 85 Cal.App.2d 623 (1948). The trier of fact could, and in the instant case by its decision did, find the knife (People's Exhibit I) to be a deadly weapon. People v. Kersey, 154 Cal.App.2d 364 (1957).

It is not incumbent upon the prosecution to establish any specific intent in a case of this type but where the evidence is sufficient to establish the character of the instrument, the requisite intent is implied by the doing of the unlawful act. People v. McCoy, 25 Cal.2d 177 (1944); People v. Peak, 66 Cal.App.2d 894 (1944).

Nor is the prosecution required to call any specific witnesses as long as they carry their burden of proof beyond a reasonable doubt to show that the defendant perpetrated the crime in question. McCray v. Illinois, 386 U.S. 300, 313 (1967); Cooper v. California, 386 U.S. 58, 62 (1967); Ferrari v. United States, 244 F.2d 132 (9th Cir. 1957), Darneille v. United States, cert.denied 355 U.S. 873; People v. Price, 172 Cal.App.2d 776 (1959); People v. McCrasky, 149 Cal.App.2d 630 (1957).

The testimony of a single witness, in this case one of the arresting officers, was sufficient to carry the prosecution's burden of proof and to support appellee's conviction. People v. Kersey, 154 Cal.App.2d 364 (1957); People v. James, 133 Cal.App.2d 478 (1955). The testimony of the arresting officer, coupled with the uncontradicted admissions of the appellee, present an almost conclusive case of the sufficiency of the evidence.

II

THE DISTRICT COURT ERRED IN HOLDING THAT THE STATE TRIAL COURT WAS COMPELLED TO ADVISE PETITIONER OF HIS CONSTITUTIONAL RIGHT NOT TO TAKE THE STAND.

The District Court held that the federal Constitution requires that a defendant in a state criminal proceedings must be warned of his constitutional right not to take the stand and of the consequences that might follow should the defendant elect to do so. The cases relied upon by the District Court do not furnish any authority for this proposition. United

States v. Luxemburg, 374 F.2d 241 (6th Cir. 1967), merely held that the Fifth Amendment privilege against self-incrimination was applicable in proceedings before a federal Grand Jury and that failure to admonish the defendant was error. Cliett v. Hammonds, 305 F.2d 565 (5th Cir. 1962), held that the failure of the federal District Court to warn a defendant in a criminal contempt proceeding of a right against self-incrimination was error. Kirschner v. Boles, 212 F.Supp. 9 (N.D. W.Va. 1963), involved a failure to comply with a state recidivist statutory requirement which was jurisdictionally mandatory, thereby rendering the sentence void.

Moreover, under the facts of this case there is an even more fundamental reason why the District Court erred in reversing Bowie's conviction. The court specifically held that the federal Constitution required the state trial court to advise a defendant of his constitutional right not to take the stand. However, the Fifth Amendment was not made applicable to the states until 1964 when the United States Supreme Court held in Malloy v. Hogan, 378 U.S. 1 (1964), that the Fourteenth Amendment makes the Fifth Amendment privilege against self-incrimination applicable to the states. In Tehan v. Shott, 382 U.S. 406 (1966), it was further held that the infringement of the privilege against self-incrimination by permitting erroneous comment on the failure of the defendant to take the stand cannot be collaterally raised to attack judgments which became final prior to the date of Griffin v. California, 380 U.S. 609 (1965). The United States Supreme Court there stated:

"As in Mapp, therefore, we deal here with a doctrine which rests on considerations of quite a different order from those underlying other recent constitutional decisions which have been applied retroactively. The basic purpose of a trial is the determination of truth, and it is self-evident that to deny a lawyer's help through the technical intricacies of a criminal trial or to deny a full opportunity to appeal a conviction because the accused is poor is to impede that purpose and to infect a criminal proceeding with the clear danger of convicting the innocent. [Citations omitted.] The same can surely be said of the wrongful use of a coerced confession. [Citations omitted.] By contrast, the Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth. That privilege, like the guarantees of the Fourth Amendment, stands as a protection of quite different constitutional values--values reflecting the concern of our society for the right of each individual to be let alone. To recognize this is no more than to accord those values undiluted respect." Tehan v. Shott, supra at 416.

So, too, the trial court's failure to advise an in propria persona defendant of his right not to take the stand is not an adjunct to the ascertainment of truth. Thus, until 1964 "the exemption from compulsory self-incrimination in the courts of the States [was] not secured by any part of the Federal Constitution." Tehan v. Shott, supra at 410, quoting Twining v. New Jersey, 211 U.S. 78 at 114 (1908).

In the instant case the petitioner's trial took place on January 20, 1961 and the judgment of conviction was affirmed by the California District Court of Appeal on February 15, 1962. Malloy v. Hogan was decided on June 15, 1964. It is therefore submitted that petitioner may not collaterally attack his state conviction on the grounds that the conviction was obtained in violation of his rights under the Fifth Amendment when the judgment was final prior to the decision in Malloy v. Hogan.

CONCLUSION

For the foregoing reasons, appellant respectfully requests that the order granting the writ of habeas corpus entered by the court below be reversed and the proceedings dismissed.

Dated: May 22, 1968

THOMAS C. LYNCH, Attorney
General of California

ALBERT W. HARRIS, JR.
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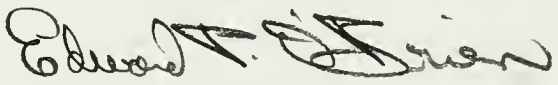

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

Dated: San Francisco, California

May 22, 1968.

Edward P. O'Brien

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